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The Boyer Company, a Utah corporation and H. roger Boyer dba The Boyer Company v. E. Keith Lignell and Burton M. Todd : Brief of Appellant

Utah Supreme Court

Earl D. Tanner; J. Thomas Bowen; Earl D. Tanner and Associates; Attorneys for Respondents.
C. Keith Rooker; Bruce A. Maak; Martineau and Maak; Attorneys for Appellants.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE BOYER COMPANY, a Utah corporation and H. ROGER BOYER dba THE BOYER COMPANY,

Plaintiffs and Appellants,

vs.

E. KEITH LIGNELL and BURTON M. TODD,

Defendants and Respondents.

Case No. 14442

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Sr., Judge

EARL D. TANNER & ASSOCIATES
Earl D. Tanner
J. Thomas Bowen
Suite 101
345 South State Street
Salt Lake City, Utah 84111
Attorneys for Defendants-Respondents

MARTINEAU & MAAK
C. Keith Rooker
Bruce A. Maak
1800 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

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NATURE OF THE CASE

This is an action brought by plaintiffs to recover from defendants a commission for broker's services rendered by plaintiffs pursuant to two agreements by the terms of which defendants retained plaintiffs to market certain realty.

DISPOSITION IN THE LOWER COURT

Following a trial of the case, the lower court entered judgment against plaintiffs and awarded to defendants their costs and certain discovery expenses.

RELIEF SOUGHT ON APPEAL

By this appeal, plaintiffs-appellants seek a reversal of the lower court's judgment and an order directing the lower court to enter judgment in favor of plaintiffs-appellants in the amount of $28,500.00, together with their costs incurred below, their costs incurred on appeal, and the amounts heretofore paid by them to defendants-respondents for costs and discovery expenses pursuant to the judgment of the lower court.

STATEMENT OF FACTS

Point III, which is the core of this appeal, presents the issue whether the lower court's finding that defendants did not fail or refuse to cooperate with plaintiffs towards the consummation of the sale of the subject realty is clearly against the weight of the evidence. Due to the nature of Point III and because the finding of the lower court to that effect is stated only as a conclusion and without any articulated factual basis (Finding No.6, R.194), a relatively detailed statement of facts is required.

Plaintiff H. Roger Boyer ("Boyer") is a Utah resident who, since 1972 has been duly licensed by the Real Estate Division of Utah Department of Business Regulation as a real estate broker. (Finding No.3, R.194). The Boyer Company, a Utah corporation, was incorporated on November 8, 1972, and

since that time has remained in good standing. (Finding No. 1, R.193). Boyer, since the inception of The Boyer Company, has been its president and sole stockholder. (T.168-69). Although the lower court concluded that The Boyer Company was not properly licensed as a real estate broker (R.186-87), the Director of the Real Estate Division of Utah testified without contradiction and the lower court tacitly recognized (R.186-87) that The Boyer Company was duly licensed as a broker pursuant to the prevailing and long-established practices of the Real Estate Division. (R.186-87, T.287-88, 299).

Burton M. Todd ("Todd") and E. Keith Lignell ("Lignell") are both dentists who, in addition to their dental practice, engage in extensive realty investment and development together. (T.12-13). At all times material to this action, Todd and Lignell were the owners of the Shaughnessy Apartments, a commercial apartment facility located at 251 South 700 East, Salt Lake City, Utah. (R.14). Todd and Lignell, because of their need for cash in the approximate amount of $250,000.00, decided to sell the Shaughnessy Apartments in late September of 1973. (T. 24, 258-59, Todd Depo. p.46).

On October 1, 1973, Todd and Lignell entered into a listing agreement (the "Listing Agreement") with Boyer authorizing Boyer to procure a sale of the Shaughnessy Apartments for the sum of $950,000.00. (T.14-15, Exhibit 1-P) For the convenience of the Court, a copy of the Listing Agreement is included

following the main body of this brief as Exhibit "A." The Listing Agreement rendered any sale of the apartments subject to the approval of the Northwestern Mutual Life Insurance Company ("Northwestern"), the holder of a mortgage upon the property, and contemplated that any purchaser would assume that mortgage and pay to Todd and Lignell the difference between the mortgage balance and the sales price. Finally, the Listing Agreement provided that Boyer was entitled to a commission of six percent of the sales price (amounting to $57,000.00) upon completion of the sale and payment by the buyers of the difference between the mortgage balance and the sales price. (Finding No.4, R.194, Exhibit "A" hereto).

The Osmond Brothers is a singing group of national repute consisting of various children of Mr. and Mrs. George V. Osmond, longtime residents of the State of Utah. The Osmond Brothers, a Utah partnership (the "Osmond Brothers") is a vehicle through which the Osmond family has conducted its investment activities. Since early 1972, Douglas L. Callister ("Callister"), a California attorney, and Lew Costley ("Costley"), an Ogden, Utah accountant, have as a practical matter managed the business affairs of the Osmond Brothers with only slight involvement of the general partners of the Osmond Brothers. (T.93-97, 113-16, Callister Depo. pp.28-32).

Between October 1, 1973 and October 11, 1973, Boyer discussed with Callister and Costley the possibility of the

Osmond Brothers purchasing the Shaughnessy Apartments, which discussions culminated in Boyer's preparation of an Earnest Money Receipt and Offer to Purchase, which was executed by Costley on behalf of the Osmond Brothers on October 11, 1973. (T.116-18, 132, Callister Depo. pp.8-17). A copy of that Earnest Money Receipt and Offer to Purchase (the "Earnest Money Agreement") in its executed final form is for the convenience of the Court included herein following the body of this brief, as Exhibit "B." The Earnest Money Agreement, as executed by Costley, was conditioned upon the buyer's ability to assume Northwestern's mortgage bearing interest at seven percent per annum and the seller's agreement to lease the property back from the buyers for a period of three years. (Finding No.7, R. 194-95, Exhibit 2-P, Exhibit "B" hereto). The Earnest Money Agreement contained an offer to purchase the Shaughnessy Apartments for $921,500.00, with a commission in the amount of $28,500.00 payable to The Boyer Company as broker. Boyer had theretofore agreed with George V. Osmond, who is also a licensed real estate broker, evenly to divide the commission from the sale, each party to receive $28,500.00. (T.98-99, Callister Depo. p.18). Accordingly, the Earnest Money Agreement, like the Listing Agreement, prescribed that Todd and Lignell would receive a net sum after the deduction of all brokers' commissions, of $921,500.00. Concurrently with their execution of the Earnest Money Agreement, the Osmond Brothers

deposited with Boyer earnest money in the amount of $5,000.00. (T.111-12, Exhibit 4-P). On October 11, 1973, Boyer delivered to Todd the Earnest Money Agreement. (T.18-19).

On October 11, 1973, Todd and Lignell discussed the Earnest Money Agreement and Todd, in anticipation of certain changes to the Agreement and his expected departure from Salt Lake City, executed the document and placed his initials in the lower right hand corner of the document. (Finding No.8, R.195, T.66). On October 12, 1973, Lignell for both himself and Todd and in the presence of Boyer deleted that portion of the Earnest Money Agreement relating to a lease back of the property by the sellers, initialled the deletion, signed the document, and delivered same to Boyer. (Finding No.9, R.195).

Boyer then returned to his office with the Earnest Money Agreement and telephoned Callister. After Boyer advised Callister of the changes made to the Earnest Money Agreement by Todd and Lignell, Callister on behalf of the Osmond Brothers authorized Boyer to enter into and close the agreement as modified by Todd and Lignell. (T.183-84, Callister Depo. pp.19-22). Within a day or two following Todd and Lignell's execution and modification of the Earnest Money Agreement, Boyer delivered the modified document to Costley. Shortly thereafter, Costley telephoned Callister and in that conversation the two decided that the Osmond Brothers would agree to enter into the Earnest Money Agreement as modified. (T.118-21). On October 15, 1973,

Boyer telephoned Todd and advised him that the Osmond Brothers had accepted the Earnest Money Agreement as modified by Todd and Lignell and desired to effect a closing as soon as possible. (T.184-85). Todd denied that Boyer advised him of the Osmond Brothers' acceptance of the modified Earnest Money Agreement, but testified that Boyer had told him that "it could be worked out." (T.21-23).

Following October 12, 1973, Boyer, Callister, Costley, and the Osmond Brothers believed that a contract had been entered into between the Osmond Brothers and Todd and Lignell represented by the Earnest Money Agreement as modified by Todd and Lignell. (Callister Depo. pp.21-27, T.120-24). Thus, between October 12, and 15, 1973, Boyer discussed with Costley the course that the Osmond Brothers should pursue in disposing of certain liquid assets to procure the down payment prescribed by the Earnest Money Agreement, and Boyer, on October 15, 1973, requested and one day later obtained from Title Insurance Agency an Interim Title Insurance Binder with respect to the Shaughnessy Apartments. (T.185-186; Exhibit 9-P).

On October 15, 1973, Boyer telephoned Todd to discuss the closing of the sale of the Shaughnessy Apartments and Todd agreed to contact Northwestern regarding the arrangement of the Osmond Brothers' assumption of the Northwestern loan (T.26-27, 184-85). Theodore C. MacLeod ("MacLeod"), a resident of Denver, Colorado, is the Regional Manager of Northwestern

and is charged with the responsibility of originating and administrating Northwestern's loans in Utah, among other states. (T.195-96, MacLeod Depo. pp.2-3). Following his conversation with Boyer, Todd telephoned MacLeod and discussed in a general way the possible sale of the Shaughnessy Apartments to the Osmond Brothers, and the alternative approaches available to effectuate an assumption of the loan by the Osmond Brothers in such a transaction. (MacLeod Depo. pp.34-36, 56, T.26-28, 47-48). MacLeod left the conversation "with the ball in [Todd's] court," and with MacLeod expecting Todd to return with a concrete proposal (MacLeod Depo. p.33). Todd, however, testified that in this conversation, MacLeod indicated that Northwestern would not permit the Osmond Brothers to assume the loan absent an increase in the interest rate thereof above seven percent. (T.27).

On October 26, 1973, Todd, Lignell, Boyer, and Earl D. Tanner met for lunch and discussed in the framework of MacLeod's comments the method by which an assumption of the Northwestern loan could be arranged. (T.189). During that conversation, Todd or Lignell indicated that Northwestern may require some additional incentive to consent to the assumption of the loan by the Osmond Brothers. (T.190). On October 29, 1973, Boyer telephoned Todd, and, during that conversation, Todd indicated

that he and Lignell were less excited about closing the sale because of a possible tax consequence of approximately $145,000.00. (T.160-62, 191-92, Exhibit 10-P). Todd, while acknowledging that he advised Boyer of that tax consequence, indicated that the tax problem did not materialize and played no role in his decision to terminate the transaction. (T.160).

On October 30, 1973, Boyer, Callister and Costley met and discussed the incentives that the Osmond Brothers would be willing to give to induce Northwestern to allow assumption, including prepayment of the 1974 interest on the Northwestern loan, an increased rate of interest on a larger loan, and the like. Boyer relayed these potential incentives to Todd. (T. 137-38, 194-95).

On November 2, 1973, Boyer telephoned MacLeod to determine the status of the proposed assumption. MacLeod refused to discuss this matter in any detail with Boyer, advising Boyer that any such inquiry must come from Todd. (T.196-97 and MacLeod Depo. p.8). MacLeod's understanding and practice in implementing the policies of Northwestern were neither to discuss nor consider any modification of financing arrangements with their borrowers absent authorization from their borrower, with whom they have privity. Boyer then telephoned Todd and inquired why no formal request had been directed to Northwestern to permit assumption. Todd promised to make such written request that day and to provide Boyer with a copy of the letter.

(T.50-51, 197-98). On November 7, 1973, Boyer asked Todd why he had not yet received a copy of Todd's promised letter to MacLeod, and Todd responded that he was awaiting MacLeod's call concerning a possible refinancing of the Shaughnessy Apartments and that Todd and Lignell were considering selling another property to satisfy their cash requirements. (T.152, 198-99, 259-61). Todd never sent the letter that he had promised to send to MacLeod (T.50-51). On November 11, 1973, Boyer again telephoned MacLeod to determine the status of assumption negotiations. MacLeod advised Boyer that Todd was aware of Northwestern's position and that Boyer should direct his inquiry to Todd. (MacLeod Depo. pp.36-37, 59-60). On November 16, 1973, Todd told Boyer that he and Lignell would not proceed with a sale of the Shaughnessy Apartments. (T.29). Boyer requested a letter to that effect from Todd which Todd prepared on November 19, 1973, a copy of which is attached hereto for the Court's convenience following the main body of this brief as Exhibit "C." (T.29, Exhibit 5-P).

ARGUMENT

POINT I

THE COURT ERRED IN ADOPTING WITHOUT MODIFICATION THE FINDINGS OF FACT PREPARED BY COUNSEL FOR DEFENDANTS AND, AT BEST, SUCH FINDINGS ARE ENTITLED TO LITTLE WEIGHT.

The lower court conducted the trial of this case between

September 22 and 25, 1975. On September 29, 1975, the lower court entered its Memorandum Decision, which enunciated the bases for its decision. (R.186-87). Approximately one month thereafter, counsel for defendants submitted to the lower court Findings of Fact and Conclusions of Law, which were signed and entered by the lower court without modification. (R.193-97). Plaintiffs timely moved the lower court pursuant to Rule 52(b), Utah Rules of Civil Procedure, to amend the Findings of Fact and Conclusions of Law theretofore entered by the lower court (R. 200-05), which motion was denied in its entirety by the lower court. (R.215-16).

This Court has long maintained that "[t]he duty of making findings and conclusions is that of the trial court." Merrill v. Bailey & Sons, 99 Utah 323, 106 P.2d 255 (1940). Indeed, that duty is expressly and absolutely imposed upon the trial court by Rule 52(a), Utah Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . .

This Court has not yet spoken to the legal effect of a trial court's mechanical adoption of the findings and conclusions of counsel. Other courts, however, have with good reason condemned the practice:

> [A]ppellant's objections were made . . . to . . . proposed findings with which the findings of the district court are apparently identical. We have recently asked for

> "brief and pertinent findings of contested matters * * * rather than the delayed, argumentative, overdetailed documents prepared by winning counsel." [Citations omitted]. Otherwise, we lose the benefit of the judge's own consideration. . . .
>
> We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts found. An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are "clearly erroneous". . . .
>
> * * *
>
> The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility; unless his findings are "clearly erroneous", no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that reason every effort should be made to render it as adequate as it humanly can be. United States v. Forness, 125 F.2d 928, 942-43 (2d Cir.), cert. denied, 316 U.S. 694 (1942). [Footnotes omitted].

Other courts have similarly discouraged trial courts' adoption without modification of findings and conclusions submitted by

counsel for the prevailing party. Phillips v. Phillips, 171 Colo. 127, 464 P.2d 876 (1970). (Because of the lower court's mechanical adoption of counsel's findings, "[w]e stretch nearly to the breaking point the presumption that the findings entered by the court were in fact the court's own findings"); Duffin v. Patrick, 212 Kans. 772, 512 P.2d 442 (1973).

In this case, the findings prepared by defendants' counsel, quite predictably, substantially embellished the lower court's Memorandum Decision. Certainly the trial court could not have agreed with each and every one of defendants' findings. The effect is that plaintiffs, and indeed this Court, must speculate as to whether the findings which are challenged through this appeal are those of the lower court or of defendants, while defendants can steadfastly urge that the same are those of the lower court and entitled to a presumption of propriety.

The lower court's findings come to this court endowed with a strong presumption of propriety, requiring a showing that the same are clearly erroneous for reversal. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972). That presumption should not properly attach to the findings of counsel, which are those of an advocate and deprive this Court of the benefit of the lower court's thoughtful reasoning and judgment. Plaintiffs' concern in this respect is one of substance, for the lower court in its Memorandum Decision made no mention of whether defendants cooperated or refused to proceed in connection with the subject

transaction -- the central issue of this appeal. Counsel's findings, however, with no supportive factual determination, baldly state that defendants did not fail or refuse to cooperate or proceed with the transaction.

Plaintiffs desire at this juncture to make absolutely clear that no suggestion is made that counsel for defendants, who are capable, honest, and ethical attorneys for whom we have great regard and respect, have in the slightest acted improperly. Indeed, defendants' counsel in submitting their findings and conclusions merely discharged their duty as advocates. Both on behalf of plaintiffs and as lawyers practicing law in the State of Utah, however, we seek to make this appeal and those that will follow the Court's decision in this case more meaningful by ensuring that the findings that reach this Court are those of the trial court, and not of counsel. For the foregoing reasons, this case should be remanded for proper findings of fact and conclusions of law by the lower court; in any event, the findings of fact herein should not be accorded the usual presumption of validity in this appeal.

POINT II

THE BOYER COMPANY WAS DULY LICENSED AS A REAL ESTATE BROKER.

In its Memorandum Decision, the lower court held:

> [t]hat the corporation cannot recover because

> said corporation was not licensed as is required by Section 61-2-1, Utah Code Annotated, 1953, as amended, and particularly is this so under 61-2-18.
>
> The Court is not unmindful of the Utah Supreme Court decision in 29 Utah 2d., at page 110, State Board of Education vs. State Board of Higher Education wherein the Court held that long interpretations by administrative bodies can be accepted, in effect, as proper even though technically they are not legal. At least that is the interpretation this Court gets from a reading of that case.
>
> It appeared from the evidence that it has long been the practice of the Real Estate Division of the Department of Business Regulation not to license corporations as brokers. However, the law is clear and unequivocal, and the Court is of the opinion that the corporation is barred from recovery. (R.186-87).

Thus, while the lower court at least implicitly recognized that The Boyer Company had been licensed in accordance with well-established and long standing practices of the Real Estate Division,[1] the lower court concluded, we believe erroneously, that The Boyer Company was not licensed as a broker within the meaning of the applicable statutes.

Section 61-2-18, Utah Code Annotated (Repl.1968) in substance prohibits any suit by any person, partnership, association, or corporation for recovery of a fee for services in

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1/ Not surprisingly, the Findings of Fact prepared by counsel for defendants do not include the lower court's factual finding that it has long been the practice of the Real Estate Division not to license corporations as brokers.

connection with sales of realty unless such person is so licensed as a broker at the time of such act. It is undisputed that unless The Boyer Company was licensed as a real estate broker during October and November, 1973, The Boyer Company cannot maintain this action. The issue presented by Point II is whether The Boyer Company was so licensed.

The uncontroverted testimonial evidence offered at trial by Stephen J. Francis, Director of the Real Estate Division of the Utah Department of Business Regulation (the "Division") was to the effect that the Division does not and will not license corporations as such, but rather licenses as brokers only natural persons. (T.272-75). According to Mr. Francis, any entity other than a natural person becomes duly qualified to act as a broker only when a natural person duly licensed as a broker becomes associated with the entity. (T.272-75). Following the Division's approval of the association between a licensed individual and the brokerage corporation, both the corporation in its name and the associated individual in his name may properly act as brokers. (T.279-82, 299). Mr. Francis testified, and the lower court in its Memorandum Decision found, that the foregoing has long been and is now the practice of the Division. (R.187, T. 284-85).

The Findings of Fact herein reflect that Boyer, an individual, at all times relevant to this case was the holder of a valid real estate broker's license. (Finding No.3, R.194).

Boyer applied for a license as broker on behalf of The Boyer Company. (Exhibit 8-P). The Division duly granted to Boyer and The Boyer Company a broker's license in the name of "H. Roger Boyer dba The Boyer Company." (Exhibit 8-P). Mr. Francis testified that, according to the practices of the Division, The Boyer Company thereupon became a qualified real estate broker, and that thereafter both Boyer and The Boyer Company could properly act as real estate brokers. (T.287-88, 299).

In the face of the foregoing uncontroverted testimony, the lower court concluded that The Boyer Company was not licensed as required by Title 61, Chapter 2, Utah Code Annotated (Repl. 1968). That chapter clearly contemplates that corporations may obtain brokers' licenses, but is at best ambiguous as to the procedure for such licensing of corporate brokers. The only provision contained in that chapter governing the application for or receipt of brokers' licenses by corporations provides as follows:

> (c) Each real estate broker's license granted to any firm, partnership, or association consisting of more than one person, or to a corporation, shall entitle such real estate broker to designate one of its officers or members, who upon compliance with the terms of this chapter shall, without the payment of any further fee, upon issuance of said broker's license, be entitled to perform all of the acts of a real estate salesman contemplated by this chapter. The person so designated, however, must make application for a salesman's license, accompanying the application of the real estate broker. If in any case the

> person so designated by a real estate broker shall be refused a license by the commission, or in case such person ceases to be connected with such real estate broker, the broker shall have the right to designate another person, who shall make application as in the first instance. Utah Code Annotated § 61-2-9(c) (Repl. 1968).

The statute just quoted, it will be noted, does not prescribe the method by which a corporation may obtain a broker's license or the form to be taken by a corporate broker's license.

The statutory requirements governing all "applicants" for brokers' licenses, however, cast light upon the probable scheme contemplated by the Legislature in enacting the above-quoted section:

> [T]he board of real estate examiners may require and pass upon such proof as may be deemed necessary to determine the honesty, integrity, truthfulness, reputation, and competency of each applicant; and shall require the applicant to pass an examination, and prescribe the passing grade. . . . Three years' full time experience as a real estate salesman or its equivalent shall be necessary before any applicant may apply for, and secure a broker's license in the state of Utah. * * * Utah Code Ann. § 61-2-6(a) (Repl. 1968) (Emphasis added).

Section 61-2-6(b) further requires that any applicant for a broker's license shall furnish information concerning previous and present residences, recommendations of individuals who are acquainted with the applicant, and the like. Based upon the mandatory statutory requirements identified above, no corporation can ever properly be an "applicant" for a broker's license,

since corporations cannot accomplish such uniquely human things as take examinations, be honest, competent, or truthful, possess experience, or develop acquaintances. It follows inescapably that although corporations may by statute be licensed as brokers, only individuals may be "applicants" for such licenses. The issue, therefore, is whether the Division's interpretation and implementation of the licensing of corporate brokers precludes the recovery of The Boyer Company.

In its Memorandum Decision, the lower court correctly recognized that "long interpretations of administrative bodies can be accepted, in effect, as proper even though they are technically incorrect." (R.187). In Colman v. Utah State Land Board, 17 Utah 2d. 14, 403 P.2d 781 (1965), this Court addressed the issue whether the State Land Board was required by law to accept the first bidder offering to lease oil and gas lands or whether the Board could properly seek competitive bidding. In resolving that question of statutory construction, the Court strongly presumed the propriety of and adopted the statutory interpretation of the State Land Board:

> From the dispute that has arisen over the situation at hand, it is obvious that our statutes leave something to be desired as to certainty. Where such uncertainty exists the interpretation and application of statutes adopted by the administrative agency is usually looked upon with some indulgence. It is both just and practical that the Board should be allowed considerable latitude of discretion in deciding

> what policies will best carry out the responsibilities imposed upon it. Due to the considerations just stated, and because of its experience and presumed expert knowledge in its field, an administrative interpretation and application of a statute, although not necessarily controlling, is generally regarded as prima facie correct and not to be overturned so long as it is in conformity with the general objectives the agency is charged with carrying out, and there is a rational basis for it in the provisions of law. 17 Utah 2d at 19, 403 P.2d at 784. (Citations omitted).

This Court, employing like reasoning, reached the same result in State v. Hatch, 9 Utah 2d 288, 342 P.2d 1103 (1959).

The issue here presented to the Court is virtually identical to that present in the Colman case. As noted above, the governing statutes here, like those in Colman, are ambiguous. The Division here, like the Board in Colman, is vested with substantial discretion in discharging its responsibilities and is presumed to possess expert knowledge in its field. E.g., Utah Code Ann. §§ 61-2-5,-6 (Repl.1968). Thus, the interpretation of the Division is to be "regarded as prima facie correct and not to be overturned so long as it is in conformity with the general objectives the agency is charged with carrying out, and there is a rational basis for it in the provisions of law." Colman v. Utah State Land Board, 17 Utah 2d 14, 19, 403 P.2d 781, 784 (1965). It remains to determine whether the Division's interpretation is in conformity with the objectives of Title 61, Chapter 2 and whether that interpretation has a rational basis in law.

The objects of the statutory scheme concerning brokers are apparent both from this Court's pronouncements and from the language of the legislation itself. In Seal v. Powell, 9 Utah 2d 372, 345 P.2d 432 (1959), the Court observed:

> [T]he real purpose of the real estate broker's legislation . . . quite clearly looks to the protection of the public from dishonest or unscrupulous persons whose business is dealing in transactions whose objects are the consummation of real estate deals. 9 Utah 2d at 374, 345 P.2d at 433.

Again, in Andersen v. Johnson, 108 Utah 417, 421, 160 P.2d 725, 727 (1945), the Court observed that the purpose of the broker licensing statutes was "to provide for registration and regulation of those engaged in the real estate business" and "to require real estate brokers and salesmen to be 'honest, truthful and of good reputation.'"

Consistent with the purpose of the broker licensing legislation, the Division licenses individuals who, unlike corporations, can ensure that their real estate activities and those of entities with which they are affiliated are discharged competently, scrupulously, and honestly. Only through association with such a person can a corporation properly act as a broker. By looking to some responsible individual, as Mr. Francis observed, the Division can address and presumably correct problems encountered by others with that broker organization. (T.266). Thus, the Division's interpretation of the broker legislation

is consistent with and reasonably designed to effectuate the purposes and policies of that legislation.

Further, the Division's interpretation has a sound statutory basis. As noted above, only natural persons can be "applicants" for broker's licenses by the very terms of the statute, but the statute also provides that corporations may be licensed as brokers. The statutes do not, however, explain how a corporation that clearly cannot be an "applicant" for such a license can nevertheless become a licensee. We submit that the statutes discussed above can be reasonably reconciled only by interpreting the same to permit the licensing of a corporate broker only through some meaningful association with a duly licensed individual.

In the event that the Court concludes that The Boyer Company was not technically a licensed broker, it must nevertheless be concluded that The Boyer Company is not precluded from recovering herein because of its substantial compliance with the statutory prerequisites to a broker's license. In Platt v. Locke, 11 Utah 2d 273, 358 P.2d 95 (1961), this Court held that a contractor who had substantially, although not technically, complied with the applicable licensing requirements could properly recover pursuant to a construction contract. There, the contractor had not obtained a required specialty contractor's license on the date of the subject contract, but obtained such license thereafter promptly upon being advised by the adminis-

trative agency of its necessity. The Court reasoned that a contractor entering into a contract without knowledge of the specialty licensing requirements should not be precluded from recovering on that ground for honest services if he was not guilty of a failure to act diligently in obtaining the license after receiving notice of its necessity.

Here, a broker's license for The Boyer Company was applied for and received in accordance with the long established practices of the Division. In Platt, the Court indicated that the contractor should not be charged with requirements of which he had no knowledge. Likewise here, The Boyer Company should not be charged with requirements that diverge from the established requirements and practices of the administering agency. Further, actual compliance with that agency's requirements must be deemed duly diligent, substantial compliance with the applicable broker licensing requirements. The evident purpose of Section 61-2-18(a), to penalize those who fail to comply with broker licensing requirements, is not served by so penalizing those who comply with the requirements, albeit honestly erroneous, of the administering agency. In this instance, in any event, the statutory purpose of ensuring the integrity and ability of brokers was fulfilled, since Todd and Lignell dealt with only one natural person serving a broker function -- Boyer, a licensed broker.

POINT III

TODD AND LIGNELL, THROUGH THEIR BAD FAITH REFUSAL TO COOPERATE AND CONCLUDE THE SALE, PREVENTED THE CONSUMMATION OF THE SALE, AND PLAINTIFFS ARE ENTITLED TO THEIR COMMISSION.

On appeal, the findings of the lower court will not be disturbed unless they are clearly against the weight of the evidence or it clearly appears that the trial court misapplied the law to the established facts. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972). A review of the record reveals that even given this difficult standard, two findings entered by the lower court are clearly against and contrary to the weight of the evidence and that, indeed, the clear weight of the evidence supports contrary findings.

Findings of Fact numbers 6 and 17 (R.194, 196) state as follows:

> 6. Defendants did not fail or refuse to cooperate with plaintiffs toward the consummation of the sale or otherwise block the said sale or prevent H. Roger Boyer from performing under the terms of the subject listing agreement.
>
> 17. Defendants were free to terminate their listing agreement with H. Roger Boyer at any time without liability and did so fairly and in good faith on the 19th day of November, 1973.

The lower court's Memorandum Decision contained no such findings, while the Findings of Fact prepared by counsel for defendants gratuitously included these determinations, which were adopted

with all other such findings by the lower court. As discussed in detail above, these findings, being gratutiously added by counsel for defendants, are not entitled to the deference that would otherwise attach to a finding of the lower court. However, a review of the evidence compels the conclusion that the clear weight of the evidence establishes that Todd and Lignell did in bad faith fail to cooperate towards and in fact refused to proceed with the proposed sale.

In Hoyt v. Wasatch Homes, Inc., 1 Utah 2d 9, 261 P.2d 927 (1953), this Court addressed a case extraordinarily similar to this case. In Hoyt, the broker, Wasatch, entered into an an agreement with the Hoyts, who desired to sell certain realty. That agreement, like the Listing Agreement here, authorized the broker to sell such realty and prescribed that the sellers were to pay a commission if a sale was consummated. (1 Utah 2d at 11, 261 P.2d at 927; Exhibit 1-P). Thereafter, the broker procured the Johnsons as prospective buyers, who like the Osmond Brothers, made a down payment and signed "the usual printed form Earnest Money Receipt and Agreement." (1 Utah 2d at 11, 261 P.2d at 927; Exhibit 2-P). The Earnest Money Receipt and Agreement did not prescribe the method by which the $19,000.00 balance of the purchase price was to be paid and recited: "terms and conditions * * * subject to adjustment agreeable to the parties." Further, the Agreement required the sellers to provide certain platting of the realty and procure its

annexation to a city. Finally, the Hoyt Earnest Money Receipt and Agreement, like the Earnest Money Agreement here, provided that "the seller agrees, in consideration of the efforts of the * * * [broker] in procuring a purchaser, to pay the said * * * [broker] the rate of commission recommended by the Salt Lake Real Estate Board." (1 Utah 2d at 11, 261 P.2d at 927-28). The sellers executed the Agreement as written. After further negotiation, the sellers and buyers did come to an oral agreement on the terms and time of payment of the $19,000.00 balance, but no formal or written contract was prepared.[2] Thereafter, the sellers procured the annexation to the city of the subdivision. The sellers testified at trial that two matters remained unresolved following the parties' oral agreement upon payment terms: (1) the sellers had not yet passed upon the acceptability of certain other property offered by the buyers as collateral and (2) the buyers had not yet posted a bond ensuring the completion of subdivision improvements as they had agreed to do. The buyers had unsuccessfully attempted to procure such a bond, but had made arrangements to obtain another bond. Likewise here, all that materially remained to

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2/ While not identical, the situation here is closely analogous. Whereas the offer as executed in Hoyt did not create an enforceable contract because of its uncertain and preliminary terms, as the Hoyt Court found, here the Earnest Money Agreement as modified by Todd and Lignell constituted a counter-offer that was unexecuted but orally accepted by the Osmond Brothers.

be done to consummate the sale was the approval of Northwestern of the Osmond Brothers' assumption of the loan.[3]

Shortly following annexation, but before any final contract had been submitted to the buyers, the sellers served upon the buyers a notice reciting that unless within five days the buyers paid the full purchase price, arranged for the installation of certain subdivision improvements, and posted the necessary bond, the sellers would consider the agreement terminated. The buyers thereupon offered to proceed with the transaction embodied in the Earnest Money Receipt and Agreement as modified by the subsequent oral agreement, but the sellers refused. At the time the buyers received such notice they, like the Osmond Brothers, were willing and able to proceed with their agreement but, "their offer met with a blanket rejection upon Hoyt's [the seller's] part, with no suggestion of counter-offer or other reasonable effort to complete the transaction." (1 Utah 2d at 13, 261 P.2d at 929). Here, as will be shown, Todd and Lignell refused to diligently seek the assumption of the Northwestern loan (which only they could arrange), and when their

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3/ Todd testified that at this juncture, all that remained to be done was (1) agreement to the deletion of the lease-back provision by the Osmond Brothers, which had already been agreed to as will be shown below, (2) agreement by Northwestern to remove from Northwestern's mortgage the doctors' dental building, which Todd indicated posed no problem, as discussed below, and (3) the negotiation of the assumption by the Osmond Brothers of the Northwestern loan. (T.157).

performance under the parties' agreement was demanded, they refused to proceed with the sale.

Based upon the foregoing facts, the Hoyt Court on two grounds concluded that the broker was entitled to recover, notwithstanding that the subject sale had not been consummated. First, the Court held that the seller's refusal to cooperate and close the transaction waived the consummated sale prerequisite to the broker's commission under the listing agreement:

> Under such circumstances Hoyt could not by refusal to cooperate, defeat the defendant's right to its commission. And we say this advisedly, notwitstanding the finding of the trial court, that when Hoyt originally engaged the defendant to sell the property, it was agreed that the commission would be paid only if a sale were consummated.
>
> That agreement certainly contemplated that the plaintiff would cooperate in good faith toward the accomplishment of the purpose for which he employed defendant. He cannot be permitted to procure them to obtain a buyer, on terms accepted by the plaintiff, and then prevent the accomplishment of what he requested and authorized them to do by arbitrarily refusing to perform his part of the transaction. Under such circumstances, he will not be heard to complain of their failure to do that which he prevents. 1 Utah 2d at 14-15, 261 P.2d at 930.

Second, the Court concluded that the Earnest Money Receipt and Agreement, which did not require a sale as a prerequisite to the broker's commission, entitled the broker to a commission because he had produced a ready, willing, and able buyer:

Defendant advances another proposition supporting the claim to its commission: That the Earnest Money Receipt and Agreement, having been executed after the listing agreement, and after the Johnsons had been accepted as buyers, superseded the former agreement; and that it expressly binds plaintiffs to pay defendant their commission. It states:

> "The seller agrees, in consideration of the efforts of the * * * [broker] in procuring a purchaser, to pay the said * * * [broker] the rate of commission recommended by the Salt Lake Real Estate Board."

Defendant points out that under such an agreement all the broker is obligated to do is to produce a ready, willing and able buyer and that at plaintiff's request it exerted "efforts * * * in producing a purchaser * * *" before, at the time of, and after the plaintiffs signed the Earnest Money Agreement and contend that it follows as an elementary proposition that the plaintiff, having so agreed, must pay. Plaintiffs, however, counter that the prior listing contract calling for a consummated sale, stands independent of the Earnest Money Receipt and Agreement, and is not necessarily inconsistent with it. In view of the language just quoted specifically covering the payment of commission for efforts of the broker in procuring a purchaser (not in consummating a sale) the writer is of the opinion that the defendant is correct in this contention also, and that for this additional reason judgment in favor of the defendant for its commission is mandatory. 1 Utah 2d at 15, 261 P.2d at 930-31.

Lines 49 and 50 of the Earnest Money Agreement here contain a provision virtually identical to that before the Court in Hoyt:

> The seller agrees in consideration of the efforts of the agent in procuring a purchaser to pay said agent a commission of $28,500.00 of the sales price (Exhibit 2-P).

Quite significantly to this appeal, the Hoyt Court reversed the trial court's judgment against the broker and remanded with directions to enter judgment against the sellers in the amount of the broker's commission.

Another case quite similar to that at bar is Curtis v. Mortensen, 1 Utah 2d 354, 267 P.2d 237 (1954). There, the broker procured from the sellers a listing agreement concerning a motel property. Thereafter, the broker on behalf of the prospective buyers executed an earnest money agreement, which was later executed by the sellers, upon the sellers' terms but subject to the buyers' approval following their examination of the motel abstract and operating statement. Before approval by the buyers, the sellers rescinded and the buyers sued for specific performance. In their suit for specific performance, the buyers failed because the buyers' agreement was conditional and no consideration had actually been paid by the buyers.

The broker then sued the sellers for his commission. The sellers defended the broker's suit for his commission upon the ground that the broker had failed to present an offer or agreement that was binding on ready, willing, and able purchasers. Nevertheless, the Court concluded that the broker was entitled to his commission. The Court recognized that the broker had not procured a binding contract between buyers and sellers, but reasoned that such a binding contract was unnecessary to the broker's recovery because (1) the buyers were prepared

to proceed on the sellers' terms and did everything possible to indicate their willingness to proceed, and (2) the sale did not materialize because the sellers changed their minds and refused to complete the transaction.

> Under such circumstances appellants have fulfilled their part of the listing agreement by having produced purchasers who were ready, willing and able to buy the listed property and are entitled to their commission. Such were the terms of the listing agreement made by the parties. There was no requirement that a binding contract be entered into and for us to add that requirement would be to make a new contract for them. This we may not do. As stated in 8 Am.Jur. Sec. 184, page 1097:
>
> > "Once the broker has procured a person who is able, ready and willing to purchase on the terms offered by the owner, he is entitled to commissions, even though the failure to complete the contract is due to the default or refusal of the employer. 1 Utah 2d at 357, 267 P.2d at 238.

Like the Hoyt Court, the Curtis Court reversed a judgment against the broker and remanded with directions to enter judgment in favor of the broker.

Based upon both Hoyt and Curtis, the law of Utah clearly requires only that the broker produce a ready, willing, and able purchaser to recover his commission pursuant to the usual "Earnest Money Receipt and Offer to Purchase" -- particularly where the seller withdraws from or fails to cooperate in consummating a sale upon his terms, the broker need not produce a binding contract to convey between purchaser and seller. Thus, even

assuming that, as the lower court found, Todd and Lignell's modification and execution of the Earnest Money Agreement constituted a counteroffer and not a binding contract, The Boyer Company is still entitled to its commission if the Osmond Brothers were ready and able to proceed with the transaction as reflected by the modified Earnest Money Agreement. Based upon the Hoyt case, if this Court concludes that Todd and Lignell refused to cooperate and withdrew from the transaction notwithstanding the Osmond Brothers willingness to proceed, Boyer may recover pursuant to the Listing Agreement notwithstanding that it was conditional upon a consummation of the sale -- that condition is waived by Todd and Lignell's refusal to cooperate and to proceed. It remains to demonstrate (1) that the Osmond Brothers were ready, willing, and able to proceed with the transaction as evidenced by the modified Earnest Money Agreement and (2) that Todd and Lignell refused to cooperate towards and refused to proceed with the sale.

A. The Osmond Brothers were ready, willing, and able to purchase the Shaughnessy Apartments on terms prescribed by Todd and Lignell. The Osmond Brothers unquestionably were financially able to proceed with the purchase of the Shaughnessy Apartments. Costley, the Osmond Brothers' accountant, testified that the Osmond Brothers possessed and had already earmarked the down payment (approximately $400,000.00) and had the ability to make the requisite mortgage payments to Northwestern even if the

Shaughnessy Apartments had generated no income. (T.122-23). Todd testified that he told MacLeod that the Osmond Brothers were considerably wealthier than he and Lignell. (T.48). The record contains no evidence casting any doubt on the Osmond Brothers' financial ability to proceed with the sale.

The record is likewise clear that the Osmond Brothers were ready and willing, even eager, to proceed with the sale. Callister testified that he instructed Boyer to accept for the Osmond Brothers the Earnest Money Agreement as modified by Todd and Lignell and authorized Boyer to proceed with the closing of the transaction. Callister further testified that the Osmond Brothers were "anxious to close" and would be "delighted to close" the transaction. When Boyer advised Callister that Todd and Lignell did not desire to proceed, Callister even gave thought to suing Todd and Lignell to enforce the modified Earnest Money Agreement. (Callister Depo. 21-27). Costley testified that the Earnest Money Agreement, as modified by Todd and Lignell, was "perfectly all right," that he was not concerned with Todd and Lignell's changes (T.120-31), and that "[w]e felt we had made a commitment on this when we signed an earnest money agreement, and we were not at liberty to make a commitment on another piece of property or sign another earnest money agreement until this one had been settled." (T.146-47). The foregoing testimony is uncontroverted. Boyer testified that he advised Todd after the modification of the Earnest Money

Agreement that the Osmond Brothers had accepted the same as modified and were anxious to close the transaction as soon as possible. (T.184-85). Todd, on the other hand, testified that although Boyer told him that Todd and Lignell's changes to the Earnest Money Agreement "could be worked out," Todd never asked and Boyer never advised him specifically that the changes were acceptable to the Osmond Brothers. (T.21, 52). Todd so testified notwithstanding his inconsistent position discussed below that he sought to arrange an assumption of the Northwestern loan by the Osmond Brothers. (T.26-28).

The lower court made no finding as to the readiness, willingness, or ability of the Osmond Brothers to purchase the Shaughnessy Apartments on Todd and Lignell's terms, but the evidence clearly establishes this fact and there exists no contrary evidence. Although the findings state that the "counteroffer was never accepted by the proposed buyers, The Osmond Brothers, in a legally binding fashion" (Finding no.11, R.195, emphasis added), the evidence clearly establishes that the Osmond Brothers orally accepted the "counteroffer" and were willing and eager to proceed with and close the transaction.

B. Todd and Lignell refused to cooperate towards and refused to proceed with the sale. According to Todd, only three things remained to be done in order to consummate the sale of the Shaughnessy Apartments to the Osmond Brothers. (T. 51-54). First, Todd maintains that he never was advised that

the Osmond Brothers were willing to proceed with the transaction absent the leaseback provision that Todd and Lignell deleted. (T.51-52). To believe Todd on this point, this Court must disbelieve Callister, Costley, and Boyer, as noted above, must believe that a broker having the prospect of earning a $28,500.00 commission would not communicate his buyer's acceptance of his seller's offer, must believe that Todd in five or six conversations with Boyer never once asked whether the Osmond Brothers agreed to the leaseback deletion, even though Todd acknowledges that this question was very important to him, and finally must believe that Todd would seek to arrange the loan assumption with Northwestern while not knowing or trying to find out whether he and the Osmond Brothers had a deal. Todd amazingly stated in his deposition that the Osmond Brothers' position on the leaseback was discussed with Boyer only once -- on November 17, 1973, when Todd advised Boyer that he and Lignell would not sell the property. (Todd Depo. pp.41-42). Even Todd was not categorical on this point, acknowledging that Boyer at least told him that the leaseback deletion "could be worked out." We submit that the evidence clearly supports the fact that the Osmond Brothers did accept Todd and Lignell's counteroffer, and the findings below are not inconsistent with that conclusion.

Second, Todd indicated that some arrangement had to be made with Northwestern to remove the doctors' dental

building from the mortgage that Northwestern held upon both the Shaughnessy Apartments and the adjoining dental building. (T.54, 157). The minimal, if not nonexistent, significance of this problem in Todd's mind prior to trial is clear: (1) Although Todd and Lignell apparently quite carefully scrutinized the Earnest Money Agreement, which contained no reference to this "problem," Todd and Lignell took no steps in any way to modify the Agreement to clarify or even point out the existence of the problem. (Exhibit 2-P). (2) During his deposition, Todd was asked to state the various reasons why the sale of the Shaughnessy Apartments was not consummated, and he never once made any reference to this "problem." (Todd Depo. pp. 41-45, T.54). (3) Todd did not mention to Boyer any problem concerning a severance of the dental building from the Northwestern loan prior to the doctors' refusal to proceed with the transaction on November 17, 1973. (T.203-04). Most significantly, however, Todd himself testified that this "problem" was really not a problem. At trial, Todd indicated on three separate occasions that this problem was one that had to be resolved with Northwestern and that MacLeod "indicated he was willing to separate it [the dental building] out," that Mac Leod indicated that "[i]t could be worked out," and that Todd believed that "if the rest of the deal could be solved that would not be a problem that couldn't be handled." (T.

30-31, 42, 49-50). The second problem, therefore, was not a problem.

Third, Todd indicated that MacLeod of Northwestern had to approve the assumption by the Osmond Brothers of Northwestern's loan to Todd and Lignell. (T.52-53). The record in this case reveals the uncontroverted fact that had Todd requested Northwestern's approval of the Osmond Brothers' assumption of the loan, approval would have been granted. MacLeod in his deposition testified as follows on examination by counsel for defendants:

> Q. I believe Mr. Rooker asked you the question, and I will ask it again: Had your company been asked to allow the Osmond Brothers to assume that existing loan at the rate of seven per cent interest in October of 1973, would you have recommended - -
>
> A. If I had been asked to recommend transfer of the loan in the unchanged amount at an unchanged rate to the Osmond Brothers, would I have recommended? I would have recommended.
>
> Q. At seven per cent?
>
> A. At seven per cent. On a realistic basis, or on a pragmatic basis, I would have had to have judged that my position was certainly not any worse than it would have been with Todd and Lignell. I was not having any increased exposure in the loan. It was being taken over on the reduced balance.
>
> The property had proven itself for several years of operation, and I was receiving a substitution of financial responsibility considerably greater than what I would have before.

It would have been, it would have been as I indicated earlier, a recommendation with reluctance. And I think instead of a recommendation, it probably would have been an acknowledgment of, you know, we are probably going to have to approve this.

Q. You would not have required then any type of consideration coming back to Northwestern for the assumption by the Osmonds?

A. In full answer, I would have to say, as I indicated earlier, that an approval of the thing would have been with reluctance. But if the request had persisted, I would have, on a pragmatic basis, simply acknowledged that this is probably something that we are going to have to go on.

Q. Do you remember, in a conversation with Dr. Todd, having Dr. Todd ask you that specifically, whether or not you'd allow them to assume it?

A. I don't recall. I do not recall.

Q. Then you wouldn't recall what your answer was?

A. I don't recall having discussed it, so I don't know how the answer could have been presumed. (MacLeod Depo. pp.40-41).

What follows will demonstrate that the Osmond Brothers were even willing to grant various incentives to Northwestern to permit their assumption, but that Todd never seriously sought to obtain Northwestern's approval of the Osmond Brothers' assumption; rather, Todd was attempting to negotiate a refinancing of the Shaughnessy Apartments for himself and Lignell. The policy of MacLeod and Northwestern regarding negotiation of assumptions

was clear and unbending. MacLeod repeatedly reemphasized that Northwestern would neither discuss nor consider any modification of financing arrangements with their borrowers absent authorization from their borrowers, with whom Northwestern has privity. (MacLeod Depo. pp.8, 10-11, 60-61, 64-65, 71). From prior dealings with MacLeod, Todd had knowledge of this policy. (MacLeod Depo. pp.60-61). Thus, on each of the two instances when Boyer telephoned MacLeod, MacLeod testified that he referred Boyer to Todd and refused to discuss the matter with Boyer. (MacLeod Depo. pp.8, 38). MacLeod was firm in his recollection that Todd had never instructed him to deal with Boyer on this subject:

> Q. Now, in answer to Mr. Bowen's question, you said that if there had been a request for a straight assumption by the Osmonds that had been pressed, you thought you would have recommended it and that it would have been approved; is that right?
>
> A. Yes, I have said exactly that. If it had been persisted on a pragmatic basis, I probably would have simply acknowledged it and recommended it, because it would have been a transfer of position of one borrower on the same loan for another. And the existing borrower was one whose financial condition was coming into, at least to my estimate of it at the time, jeopardy, question, etc.
>
> The other borrower, the assuming party, was coming to me representing to be an entity of financial strength.
>
> Q. Now, who would that request have had to come from?
>
> A. The request would have had to come from the borrower.

Q. That is, Todd, specifically?

A. From Todd or from a party that Todd would have authorized us to receive the request from.

Q. And did Todd ever authorize you to receive such a request from anyone other than himself?

A. Not that I recall. And I say that firmly, footnoting it.

Q. If someone had persisted in such a request, who would have had to have persisted?

A. It would have had to have persisted from Todd or from a party Todd had authorized us to receive the persistent inquiry from. (MacLeod Depo. pp.64-65).

There exists no question, therefore, that the power to arrange an assumption lay solely in the hands of Todd. Todd implicitly recognized this fact by acknowledging that MacLeod had complained to him about Boyer's calling MacLeod regarding the assumption. (T.75).

The following evidence, established through Todd and MacLeod, clearly indicates that Todd did not seriously seek to arrange an assumption of the loan by the Osmond Brothers. Todd admitted that he never made a concrete proposal concerning assumption to MacLeod. (T.79). Indeed, Todd never even advised Mac Leod that he and Lignell had agreed to sell the Shaughnessy Apartments to the Osmond Brothers. (T.156). MacLeod confirms this fact in repeatedly pointing out that on each occasion that he spoke with Todd generally about the assumption question, he left

Todd with the initiative and awaited a concrete proposal from Todd. (MacLeod Depo. pp.32-35). Todd admitted that even though Boyer specifically requested that he seek in writing the consent of Northwestern to assumption, and even though Todd promised to write MacLeod a letter to that effect, Todd never wrote such a letter. (T.50-51). On April 16, 1973, when Todd sought another unrelated modification of his and Lignell's loan relationship with Northwestern concerning the Shaughnessy Apartments, as one would expect, he did so in writing. (T.57, Exhibit 12-P). Contrary to Todd's testimony, MacLeod unequivocally stated that he did not recall Todd's having requested that the Osmond Brothers be permitted to assume the Northwestern loan without modification. (MacLeod Depo. pp.32, 25, 41). During the time that Todd was communicating with MacLeod concerning this subject, Callister and Costley advised Boyer that the Osmond Brothers would be willing to prepay the 1974 interest on the Northwestern loan, to increase the rate of interest on a larger loan, or pay additional monies to Northwestern to induce the latter to allow assumption. (Callister Depo. p.25). Todd testified that he recalled Boyer advising him of the Osmond Brothers' willingness to prepay interest and increase the loan interest rate, but Todd never passed that on to MacLeod. (T.52-53).[4]

4/ Contrary to his trial testimony, Todd during his deposition testified that he never presented MacLeod with any proposal other than a pure substitution of the Osmond Brothers, because Boyer never gave Todd any other basis. (Todd Depo. pp.36-37).

The testimony of Todd, without more, conclusively establishes that he did not seriously seek Northwestern's permission to allow the assumption. Todd's recollection of his first discussion with MacLeod in late October, 1973 was as follows:

> He said, "Do you really want permission?" And I said, "No, we really don't. It is a project we like and has been very successful." And he said, "There may be another way, that won't be necessary to do it. (T.155).

The "another way" mentioned by MacLeod was a refinancing by Northwestern of the Shaughnessy Apartments. Thus, during late October and through November 15, 1973, Todd discussed with MacLeod a refinancing of the Shaughnessy Apartments by Northwestern -- an objective obviously inconsistent with a sale of the property to the Osmond Brothers. (Todd Depo. pp.38-39, T.24-25, 52-56). During this same period of time, Todd was supposedly seeking Northwestern's approval of the assumption by the Osmond Brothers. We submit that the foregoing establishes that the clear weight of evidence indicates that Todd and Lignell refused to cooperate towards the consummation of the subject sale to the Osmond Brothers.

On November 19, 1973, Todd sent to Boyer a letter stating as follows:

> As I have indicated to you over the past several weeks thru telephone conversations, we have decided, for various reasons, not to sell the Shaughnessy Apartments. (Exhibit 5-P, Exhibit "C" hereto).

Todd testified at trial that in mid-November, 1973 he advised

Boyer that he and Lignell would not proceed with the sale because Boyer presented him with a "yes or no" ultimatum; in his letter, by contrast, Todd indicated that he had advised Boyer for "several weeks" that he and Lignell had decided not to sell the property. In his deposition and at trial Todd conceded that at least a "minor reason" in his decision not to sell the property was a potential adverse tax consequence of such sale amounting to $145,000.00. (Todd Depo. pp.44-45, T.160). In any event, the foregoing makes clear that Todd and Lignell did decide not to sell the property, and the readiness, willingness, and ability of the Osmond Brothers to proceed played no role in that decision.

We respectfully submit that the facts of this case are in every respect almost identical to those presented to this Court in Hoyt: In both cases the sellers and the broker entered into listing agreements requiring a consummated sale to entitle the broker to a commission; in both cases the sellers and the broker subsequently entered into an Earnest Money Agreement not imposing that prerequisite; in both cases the broker produced a ready, willing, and able purchaser; in neither case did the broker produce a binding, written contract between seller and purchaser; in both cases the sellers refused to cooperate towards and to proceed with the sale. The result that obtained in Hoyt should therefore obtain here -- the lower court's judg-

ment should be reversed with instructions to enter judgment for the borker.

Only one material difference exists between this case and Hoyt. Here, Boyer as broker entered into the Listing Agreement, while The Boyer Company as broker entered into the Earnest Money Agreement. Should the Court conclude that a technical licensing defect precludes recovery by The Boyer Company under the Earnest Money Agreement, Boyer should recover under the Listing Agreement.[5]

CONCLUSION

In its Memorandum Decision, the lower court concluded that plaintiffs could not recover because (1) Boyer failed to bring about a consummated sale of the property, (2) The Boyer Company was not a duly licensed broker, (3) the Osmond Brothers did not properly accept Todd and Lignell's counter-offer, and (4) the Earnest Money Agreement was ineffective because another listing agreement was in effect.

The lower court made no determination as to whether Todd and Lignell failed to cooperate towards effectuating a sale

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5/ Defendants will no doubt argue that Boyer cannot so recover because the lower court "found" that all efforts in connection with the Earnest Money Agreement were those of The Boyer Company. (Finding No.16, R.196). Aside from the fact that absolutely no evidence supports this "finding," Todd testified that he paid no attention to any difference between Boyer and The Boyer Company in connection with the Listing Agreement and the Earnest Money Agreement. (T.56).

other than through the findings prepared by counsel for defendants. If, as we submit is clear, this Court concludes that defendants so failed to cooperate and refused to sell, the lower court's first and third grounds fail as a matter of law under Hoyt. With respect to The Boyer Company, in any event, the first and third grounds pose no bar, since its commission under the Earnest Money Agreement was conditioned neither upon a binding contract to sell nor a sale.

The Boyer Company, as the lower court found, was licensed as a broker pursuant to well established practices of the Real Estate Division. Those practices reflect a defensible construction of the relevant statutes, which are reasonably calculated to serve the evident statutory goals and should be upheld by this Court. In any event, The Boyer Company should not be penalized for complying with the practices of the Real Estate Division even if those practices are determined to diverge from the statutory dictates. Even if The Boyer Company was not duly licensed, Boyer the individual as a licensed broker should recover under the Listing Agreement.

The lower court's fourth ground bears only brief mention. Defendants and Boyer, the president and sole stockholder of The Boyer Company, entered into the Listing Agreement. Defendants and The Boyer Company, both with evident knowledge of the prior Listing Agreement, entered into the Earnest Money

Agreement. From the course of events recited above, it is clear that the Listing Agreement contemplated a later preliminary contract to convey involving Boyer, Todd, and Lignell -- The Earnest Money Agreement effectuated that intent and should be given effect. Defendants testified that they did not distinguish between the two in connection with both the Listing Agreement and the Earnest Money Agreement (T.56), and for that reason neither should this Court insofar as the lower court's fourth ground is concerned. The fourth ground in any event could not affect Boyer's right to recovery. The judgment of the lower court should be reversed.

RESPECTFULLY SUBMITTED,

MARTINEAU & MAAK

By: Bruce A. Maak
Attorneys for Plaintiffs-Appellants

EXHIBIT "A"

October 1, 1973

Mr. H. Roger Boyer
548 East South Temple St.
Salt Lake City, Utah

Dear Mr. Boyer;

This letter will authorize you to proceed with negotiations for the sale of the Shaughnessy Apts. at 247 South 7th East St. in Salt Lake City at a figure of $950,000.00, (Nine hundred fifty thousand dollars) with a commission of 6% (six percent) of the sales price due you upon completion and full payment of the difference between the mortgage balance and the sales price. (approximately $437,541.88).

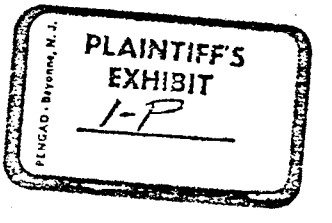
The sale of this property is subject to the approval of Northwestern Mutual Life Insurance Company, the holder of the permanent mortgage.

Our Dental Building is involved in the mortgage with Northwestern Mutual Life and it must be clearly understood that it is not part of the deal and will be separated out and remain the property of Todd and Lignell.

Sincerely,

Burton M. Todd, Partner

BMT/jt



"THIS IS A LEGALLY BINDING CONTRACT, IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

TO: The Boyer Company (Name of Broker Company) Salt Lake City, Utah, Oct. 11, 19 73

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we The Osmond Brothers, A Utah Partnership hereby deposit with you as earnest money the sum of ($ 5,000.00) Five thousand and no/100---------- DOLLARS in the form of Check to secure and apply on the purchase of the property situated at: 251 South 700 East inclusive of property with carports and all rights of way for ingress and egress.

Salt Lake City, Salt Lake County, State of Utah including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures except None

The following personal property shall also be included as part of the property purchased: All equipment used in operation of the units for cleaning, maintenance or other purposes, carpets, drapes, air conditioning, all appliances.

The total purchase price of ($ 921,500.00) Nine hundred twenty-one thousand five hundred and no/100 DOLLARS shall be payable as follows: $ 5,000.00 which represents the aforedescribed deposit, receipt of which is hereby acknowledged by you: $ --------- when seller approves sale; $ 404,500.00 on delivery of deed or final contract of sale which shall be on or before October 18, 19 73 and $ ------ each month commencing assumption of $512,000.00 mortgage with Northwestern Mutual Life Insurance Company bearing interest at 7%. Offer made subject to ability to assume above mortgage or equivalent financing. ~~Also, seller agrees to lease back property from buyer for period of three years for $36,500 per annum with lessee paying all expenses and mortgage payments.~~ E.L.S.

until the balance of $ see above together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at see above % per annum on the unpaid portions of the purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before Oct. 18, 19 73 All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except: None

The following special improvements are included in this sale: Sewer [X]—Connected [X]. Septic Tank and/or Cesspool [ ]. Sidewalk [X]. Curb and Gutter [X]. Special Street Paving [X]. Special Street Lighting [X]. Culinary Water (City [X]. Other Community System [ ]. Private [ ] (Legend: Yes (x) No (0).

CONTRACT OF SALE OR INSTRUMENT OF CONVEYANCE TO BE MADE ON THE APPROVED FORM OF THE UTAH SECURITIES COMMISSION IN THE NAME OF As directed

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within One days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall abrogate this Earnest Money Receipt and Offer to Purchase.

The Boyer Company (Broker Company) Agent By H. Roger Boyer

We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed. In the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of $28,500.00 % of the sale price. In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

10/11/73 (Date) E. Leith Laycell (Seller)

10-11-73 (Date) Burton M. Cole (Seller)

(Purchaser)

PLAINTIFFS EXHIBIT 2-P

EXHIBIT 2
COSTLEY
11/19/74

(State law requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. Dependent upon the method used, one of the following forms must be completed.)

RECEIPT

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

E. Leith Laycell (Seller) 10/11/73 (Date) (Purchaser) (Date)

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the [ ] Seller, [X] Purchaser, on Oct 12, 19 73, by registered mail and return receipt is attached hereto.

Broker THE BOYER COMPANY By H. Roger Boyer

APPROVED FORM — UTAH SECURITIES COMMISSION

EXHIBIT "C"

November 19, 1973

Mr. H. Roger Boyer
548 East South Temple
Salt Lake City, Utah

Dear Roger:

As I have indicated to you over the past several weeks thru telephone conversations, we have decided, for various reasons, not to sell the Shaughnessy apartments.

We appreciate your interest and regret that circumstances dictate a negative decision at this time.

Sincerely,

Burton

Burton M. Todd

BMT/jt